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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-179

NANCY A. BRAKE,
Petitioner,

vs.

MFA MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals
Saint Louis District

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MFA MUTUAL INSURANCE COMPANY,
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PETITION FOR A WRIT OF CERTIORARI

To the Missouri Court of Appeals
Saint Louis District

The Petitioner, Nancy A. Brake, respectfully prays that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Saint Louis District, entered in the above case on February 25, 1975.

OPINIONS BELOW

The opinion of the Circuit Court for the County of St. Louis, State of Missouri is not and will not be reported. It is attached as Appendix A hereto. The opinion of the Missouri Court of

Appeals, Saint Louis District, and that Court's Order denying Mrs. Brake's motion for rehearing, or, in the alternative, for Transfer to the Supreme Court of Missouri en banc, are not as yet reported. They are attached as Appendix B and C hereto. The Order of the Supreme Court of Missouri denying Mrs. Brake's Application for Transfer to the Missouri Supreme Court en banc, is not as yet reported. It is attached as Appendix D hereto.

JURISDICTION

The order of the Missouri Supreme Court denying Mrs. Brake's Application for Transfer was rendered on May 12, 1975 and became final for purposes of review on such date. This petition for certiorari is being filed within 90 days of that date. The jurisdiction of this Court is envoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Is a cause of action barred under state uninsured motorist statutes solely because a state's minimum Financial Responsibility Law Limits are available on paper in a hypothetical or theoretical sense as distinguished from actually available to the insured?

2. If recovery is allowed under question 1 are minimum limits set by state financial responsibility laws equated with maximum recovery or may injured insureds "stack" uninsured motorist policies where such parties' actual loss is in excess of the minimum statutory limits? A corollary to question 2 is

Does the uninsured motorist carrier have a right of subrogation to the extent of the monies paid by the original tort-feasor's liability insurance policy when complete indemnification has not been made to the injured insured?

STATUTES INVOLVED

Sections 379.203, RSMo, as amended, 1972 (The Missouri Uninsured Motorist Statute) and 303.020 (10) of the Revised Statutes of Missouri (minimum limits of automobile liability insurance policies), are reproduced as Appendix E (App. pp. A-14-15). As approximately thirty five (35) states have adopted rather standard language for their respective uninsured motorist statutes, Widiss, A Guide to Uninsured Motorist Coverage, p. 129, such language is also set out hereafter in the Appendix as Appendix F (App. p. A-16).

STATEMENT OF THE CASE

Silas William Brake, husband of plaintiff Nancy A. Brake, was killed in a two-car automobile collision caused solely by the negligence of Donald W. Miller. Others killed in the collision between the Brake and Miller vehicles were Miller, Harold G. Brake and one Lorance. Silas William Brake, Harold G. Brake and Lorance left surviving dependent widows and 13 minor children. Four other persons received serious personal injuries in the collision. At time of collision Miller carried a policy of automobile liability insurance issued by Automobile Club Inter-Insurance Exchange which complied with the minimum requirements for exception from the suspension provisions of The Motor Vehicle Safety Responsibility Law of Missouri (§ 303.020 (10), RSMo 1969) subject to limits of required coverage of not less than $10,000 because of bodily injury to or death of one person in any one accident and $20,000 because of bodily injury to or death of two or more persons in any one accident. Miller's insurer filed an interpleader suit against twenty-one persons who had asserted claims of various kinds arising out of the negligence of Miller, and paid $20,000 (the maximum liability under the insurance policy) into the registry of the court.

The court ordered the $20,000 prorated among the claimants, awarding Nancy A. Brake $2,600 for her individual claim and $1,400 for the benefit of her five minor children, and awarding sums of from $1,000 to $4,000 to other claimants. Nancy A. Brake gave a receipt but not a release for the $4,000. Her cause of action for the wrongful death of her husband and on behalf of her five children had an agreed value of $50,000 (the wrongful death limit at such time in Missouri).

Silas William Brake, joint owner with his wife Nancy of the automobile in which he was riding as a passenger at time of collision, had purchased and paid premiums on two policies of automobile liability insurance issued by MFA Mutual Insurance Company on two different automobiles. Each policy provided uninsured motorist coverage for Mr. Brake and his spouse in the sum of $10,000 for each person and $20,000 for each accident.

The provisions of the two MFA policies extending uninsured motorist protection to Silas William Brake and his spouse obligated MFA to "pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle; * * *." Paragraph 2 defined "uninsured highway vehicle" as "a highway vehicle with respect to the ownership, maintenance or use of which there is no bodily injury * * * **insurance policy applicable** at the time of the accident with respect to any person * * * legally responsible for the use of such highway vehicle * * *."

The case was decided upon stipulated facts between the parties and the Circuit Court and the Missouri Court of Appeals rendered their decisions, Appendix A and B hereto, in favor of MFA. The Missouri Supreme Court declined to accept transfer of the case, Appendix D.

The courts below based their decision denying recovery on the status of the motor vehicle being driven by the tort-feasor having complied with the minimum requirements of Missouri's Financial Responsibility Law and hence not being uninsured under the MFA policies or the uninsured motorist statute. The courts below employed a test of technical applicability, i.e. paper availability of the minimum limits of the Financial Responsibility Law rather than actual availability to the extent of said minimum limits to Mrs. Brake.

REASONS FOR GRANTING THE WRIT

A. Review by This Court Is Warranted to Resolve a Substantial Conflict Among the State Court Decisions Interpreting the Purpose of State Uninsured Motorist Statutes Where Injured Insureds Do Not Have Actually Available to Them the Protection of Financial Responsibility Laws Because of a Multiplicity of Claims Made Against a Policy Complying With Minimum Financial Responsibility Law Limits as Such Decisions Denying Coverage Are in Conflict With Applicable Decisions of This Court.

The Courts of Arizona and California have recognized and given effect to Mrs. Brake's contention herein. *Porter v. Empire Fire & Marine Insurance Company*, 106 Ariz. 274, 475 P2d 258 (Ariz. Sup. 1970), and *Kirkley v. State Farm Mutual Insurance Company*, 17 Cal. App. 3d 1078, 95 Cal. Rptr. 427 (Cal. App. 1971).

The Courts of Texas, Oregon, and now Missouri ignore and disregard the reason behind uninsured motorist statutes and allow no recovery in this factual situation.

Porter and *Kirkley* allow recovery under uninsured motorist statutes and coverage where, although the tort-feasor has liability insurance complying with minimum limits of Financial Responsibility Law, claims for serious injury of more than one person are made and hence insurance of such person legally responsible is not sufficient to cover multiple claims and the injured party, because of the multiplicity of claimants, does not have available to him the entire per person minimum limits mandated by the state's Financial Responsibility Law to be applicable on such insurance policy. The basic rationale of such decisions is that uninsured motorist statutes and financial responsibility laws are for the protection of the public and to hold

otherwise and deny recovery is to thwart the protection expected by the injured party (in purchasing this type of first party coverage) and intended by the legislature for while the minimum limits of the tort-feasor's policy of insurance is said to be available it is paper coverage only theoretically or hypothetically available because actually it is subject to proration among multiple claimants. *Porter* and *Kirkley* emphasize that under a contrary holding the injured party faces the absurd anomaly that he would have been in a better position if the tort-feasor had been totally uninsured for as long as the injured party has the original policy theoretically available even though he recovers not $1.00 thereon, he has no right of action on his own uninsured motorist policies which he purchased.

On the other side of the fence on this precise issue where there are multiple claimants who have not had actually available to them at least the minimum limits of the state's financial responsibility law are Texas, Oregon and now Missouri. These states, it is respecfully submitted, ignore and disregard the reason behind uninsured motorist statutes to effectuate at least a minimum of protection and disallow any recovery[1] on the theory that proper inquiry forecloses relevancy of determination as to whether minimum limits were actually available to the injured party as long as such limits were on paper hypothetically or theoretically available at the time of the accident by the tort-feasor having a policy complying with the minimum statutory limits of that state. These courts denying recovery in these circumstances have departed from the accepted and usual canons of construction of statutes and such interpretations are in direct

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[1] *Lund v. Mission Insurance Company*, Ore. Sup., 528 P2d 78 (en banc 1972) and the Missouri Court of Appeals decision herein, Appendix B hereto; *Kemp v. Fidelity & Casualty Company of New York*, Tex. App., 504 SW2d 633. In the Oregon case the injured party plaintiff actually recovered not one cent on the insurance policy of the person legally responsible to her in damages but the Court still disallowed her any recovery under the uninsured motorist policy or statute.

conflict with decisions of this court in which review was warranted by certiorari to avoid a literal reading of a statute which would otherwise lead to an absurd result *Haggar Company v. Helvering*, 308 US 389 (1940); *Cox v. Roth*, 348 US 207 (1955). This court should also grant certiorari as it has so done to construe remedial legislation (which uninsured motorist legislation obviously is) broadly to effectuate its purposes *Teherepnin v. Knight*, 389 US 332 (1967), and in order to adopt a construction as will carry into execution the will of the legislature *Kokoszka v. Belford*, — US —, 94 S Ct 2431 (1974) by looking to the provisions of the entire law and to its object and policy. *Richards v. U.S.*, 369 US 1 (1962).

B. Review by This Court Is Warranted to Resolve Conflicts in Decisions of the Circuit Courts of Appeal on Whether or Not "Other Insurance Clauses" Are Applicable to Limit Recovery to Less Than Actual Loss.

The Uninsured Motorist coverage of the two (2) policies issued by MFA contain the standard clause limiting coverage.[2] Since the parties stipulated the death claim of Mrs. Brake has a legal value of $50,000 this case poses the additional question of whether MFA's liability can be so limited to the $10,000 in one of its two (2) $10,000 uninsured motorist policies.

The Circuit Courts of Appeal are in conflict on this issue. One line of cases holds that Mrs. Brake should recover the entire $20,000 (the sum total of the two (2) policies) as there is no double recovery where her damages, i.e., $50,000 are still

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[2] Other Automobile Insurance in the Company—With respect to any occurrence, accident, death, or loss to which this and any other automobile insurance policy issued to the named insured or spouse by the Company also applies, the total limit of the Company's liability under all such policies shall not exceed the highest applicable limit of liability or benefit amount under any one such policy.

not fully indemnified[3] reasoning that such a limitation runs contradictory to the standard insuring agreement of each policy that the company shall pay *all sums* which the insured could recover from the legally responsible uninsured motorist. Furthermore, those courts which have struck down such a limitation emphasize that such view follows from a proper construction of uninsured motorist statutes as the legislative mandate does not permit "other insurance" clauses in the policy for such are contrary to the statutorily mandated minimum amounts of coverage for the statute should not limit an insured loss only to one $10,000 recovery under said coverage where loss for bodily injury is greater than $10,000 and the injured party is the beneficiary of more than one policy as *every* policy must be issued in compliance with the Financial Responsibility Law and the uninsured motorist statute. Moreover, this view holds that minimum statutory coverage should not be equated with maximum recovery where indemnification is not complete and the insured has paid two (2) separate premiums.

The contrary view[4] holds that such limiting language of uninsured motorist policies do not offend legislatively mandated minimum statutory sum for the insured has access to at least the statutory minimum and public policy is to afford the same protection to the injured party that he would have had had the uninsured motorist carried the minimum limits of liability coverage.

A corollary problem is the right of subrogation given by most state uninsured motorist statutes. Such language normally fol-

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[3] *Booth v. Seaboard Fire & Marine Insurance Company*, 431 F2d 216, l.c. 216 (8th Circuit 1970); *Martin v. State Farm Mutual Automobile Insurance Company*, 375 F2d 720 (4th Circuit 1967); *Safeco Insurance Company of America v. Robey*, 399 F2d 330 (8th Circuit 1968); *State Farm Mutual Automobile Insurance Co. v. McNutt*, 494 F2d 1282 (6th Circuit 1974).

[4] *McCarthy v. Preferred Risk Mutual Insurance Company*, 454 F2d 393 (9th Circuit 1972); *Chandler v. Government Employees Insurance Company*, 342 F2d 420 (5th Circuit 1965).

lows the standard language of Uniform Statutory Provisions[5] Widiss, A Guide to Uninsured Motorist Coverage, p. 313 and the standard subrogation clause contained in the MFA policies.[6]

The right of subrogation given, literally interpreted, would subrogate MFA to Mrs. Brake's rights against the original tort-feasor and hence, ultimately his insurance coverage to the extent of Mrs. Brake's receipt of $4,000 therefrom.

The Fourth Circuit Court of Appeals has dealt squarely with the problem of such subrogation statutes and policy language in holding that no right of subrogation exists. *White v. Nationwide Mutual Insurance Company*, 361 F2d 785 (4th Circuit 1966); *Martin v. State Farm Mutual Automobile Insurance Company*, 375 F2d 720 (4th Circuit 1967). The rationale of the holdings of *White* and its progeny is that the uninsured motorist carrier misconstrues its subrogation rights when it contends the policy and the statute gives it first rights ahead of the injured insured to the monies paid by or on behalf of the orig-

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[5] In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such prson against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer; provided, however, with respect to payments made by reason of the coverage described in subsection . . . above, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

[6] *Subrogation*—In the event of any payment under uninsured motorist coverage of this policy, the Company shall be subrogated to all rights of recovery therefor which the insured or any person receiving such payment may have against any person or organization, and the insured, or such person, shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured, or such person, shall do nothing after loss to prejudice such rights.

inal tort-feasor as no paramount right of subrogation arises until the insured has received full indemnity. To the same effect is this court's view on the theory of subrogation dating back to at least 1880. *Insurance Company v. Stinson*, 103 US 25 (1880). As this problem of subrogation is corollary to the question of indemnity posed by the "other insurance clause" cases in which the decisions of the Courts of Appeal are in conflict this Court should grant the writ.

C. Review by This Court Is Warranted in View of Paramount Public Importance to Call for an Exercise of This Court's Power of Supervision to Right an Injustice Herein and to Prevent Continuous Litigation in the Circuit Courts of Appeal and the State Courts.

Uninsured motorist coverage ranges from 5/10 20/40, depending upon the state. Widiss, A Guide to Uninsured Motorist Coverage, p. 284. It takes little imagination to recognize that expenses alone resulting from injuries sustained by four or five persons riding in a car struck by an uninsured motorist may each exceed such coverage.

Moreover, most frequently found coverage limit for automobile bodily injury liability insurance is $10,000 per person although fatality cases suffer average actual losses of $89,000 per fatality; $10,000 per person coverage is held by about 30% of all policy holders in the United States. Schwartz, "The Fair Pay Plan—Fair Play for Consumers," Trial (Nov/Dec 1971). Insurance companies have for the most part made uninsured motorist coverage available only in the minimum amounts required by state financial responsibility laws. Widiss, A Guide to Uninsured Motorist Coverage, p. 137. Hence, the injustice befalling petitioner is most assuredly not an isolated problem but has potentially enormous impact and wide application to the entire public. Unless this Court grants certiorari and closely

examines the questions posed therein petitioner and all other citizens similarly situated stand to be left grossly uninsured against irresponsible motorists despite these citizens' attempts to insure themselves against such a contingency and contrary to the purpose of uninsured motorist legislation. Furthermore, of all federal and state decisions on any of the three questions posed herein by petitioner, only petitioner's cause poses all three (3) issues in one case which, if certiorari be granted, could be resolved with finality.

CONCLUSION

For the foregoing reasons, Mrs. Brake respectfully prays that her Petition for a Writ of Certiorari be granted.

Respectfully submitted

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